UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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BANCO SAN JUAN INTERNACIONAL, INC.,

Plaintiff,

v. 23 Civ. 6414 (JGK)

THE FEDERAL RESERVE BANK OF NEW YORK, *et al.*,

Defendants. Oral Argument

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New York, N.Y.
December 12, 2024
10:30 a.m.

Before:

HON. JOHN G. KOELTL,

District Judge

APPEARANCES

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(Case called)

THE DEPUTY CLERK: All parties please state who they are for the record.

MR. LOWELL: Good morning, your Honor. On behalf of Banco San Juan, Abbe Lowell of Winston & Strawn, Kelly Librera of Winston & Strawn, Matthew Olsen of Winston & Strawn, and the general counsel of the bank, Eric Bloom.

THE COURT: Good morning.

MR. YOUNGWOOD: Good morning, your Honor. For defendants the Federal Reserve Bank of New York, Jonathan Youngwood, Simpson Thacher.

MS. KARP: Meredith Karp, also Simpson Thacher, and also for the Federal Reserve Bank of New York.

THE COURT: Good morning.

MS. KALSTEIN: Michele Kalstein, Federal Reserve Bank of New York.

MR. BRENNAN: Michael Brennan, Federal Reserve Bank of New York.

MR. CHADWICK: Good morning, your Honor. Joshua Chadwick for the Federal Reserve Board, along with my colleague Nick Jabbour.

THE COURT: Good morning.

All right. We have a motion to dismiss. As I've previously told you, one of my former clerks works at the Board in Washington. Nothing about that affects anything that I do

in the case.

All right. Mr. Youngwood?

By the way, you all should aim for something like ten minutes or so. I'm sure I'll have questions for you.

MR. YOUNGWOOD: Thank you, your Honor, and I'm going to perhaps be even briefer, subject to your questions, because I know we were all here a little more than a year ago and the issues really have not changed, even if the style of the motion and the state of the case has changed.

In that regard, your Honor, this is a motion to dismiss the amended complaint. There are some additional allegations and purported facts, many of them I think pled in a conclusory way, but none of them, none of the well-pled new facts in any way, we submit, change the Court's core legal analysis in its October 27 order. And without going into every aspect of that or every aspect of the substantive briefing that you have both on that motion and again on this before you, the three pillars of that are that the Federal Reserve Bank of New York and the other Federal Reserve banks have discretion to open or close master accounts under the FRA; the Federal Reserve Bank of New York here has a contractual right to close the BSJI master account; and, as your Honor found, the bank is not an agency of the United States.

What has changed in the last year is two other district courts have joined your Honor's analysis, the

Payservices case coming out of Idaho, and the *Custodia* case coming out of Wyoming. The *Custodia* case I think is of particular note——they're both of particular note, but that one was argued and has been argued, did go through a motion to dismiss, there was discovery allowed, and there was a summary judgment ruling which, notable about that summary judgment ruling is it doesn't rely on the discovery to reach the statutory conclusions that your Honor reached on the preliminary injunction order.

THE COURT: That's on appeal now, right?

MR. YOUNGWOOD: *Custodia* is on appeal, as is *Payservices*. *Payservices* was argued——we represent the bank, the Federal Reserve Bank of San Francisco. That was argued a week ago in San Francisco before the Ninth Circuit. And I understand the *Payservices*——sorry——*Custodia* argument is scheduled for the end of January in the Tenth Circuit. So they are both obviously ahead of this case in that regard. And of course I'm not suggesting those district courts' decisions or even decisions of those circuit courts would be controlling here, but they do provide further, we would say, persuasive authority.

THE COURT: Do both cases raise the issue of right to a master account?

MR. YOUNGWOOD: Yes.

THE COURT: Okay.

MR. YOUNGWOOD: And in fact both cases, your Honor, there are other ways in which they differ. Every case has its own facts. They both directly raise——in those decisions, both directly discuss——and I believe both decisions came out in the middle of the briefing here, and they're both referenced in the reply briefs, not in the opening briefs, because they weren't, obviously, available. They both came out at the end of March. Both raised the agency issues square on and both raised the discretion issues square on.

THE COURT: Both cases said that a Reserve bank is not an agency?

MR. YOUNGWOOD: Yes.

THE COURT: Okay.

MR. YOUNGWOOD: And both said that there was discretion and the claims are largely overlapping. What is absent from those is that there was no contract, so here, we think the discretion argument——hold on a second.

Your Honor, I misspoke. *Payservices* raises agency, *Custodia* does not. So I correct myself.

The additional difference, your Honor, is that there's no contract there, and so we submit to you that the contract first confirms that the reading of the statutory scheme, that there is discretion, is confirmed we think by contracts that clearly confirm discretion, and that they of course provided an independent right, even if the statutory reading was different.

As your Honor knows, there are two contracts that are pled here——both the original one relating to the operating circular No. 1 and then the supplemental agreement. The supplemental agreement does not overwrite the operating circular. It reconfirms the rights to terminate in it but it gives additional rights to terminate, and under the law we've cited, the New York law and law in this district, that right really controls the contractual claim.

I am aware that there are some additional allegations in the complaint concerning good faith or lack of good faith. First, I'd submit to your Honor, those are completely conclusory. They simply say it, and so I do not think they're pled plausibly or in a way that they're warranting of any credit. But they wouldn't overlap——they wouldn't overwrite the contractual provisions that give the full and sole discretion to the bank to terminate the master account with the only provision being on a certain number of days' notice, if practicable.

There is also an argument that I don't think was raised before, which is pointing in the contract to the limitation of liability provision and the words "good faith" within it. The problem with that reading, your Honor, it's in the limitation of liability provision. It doesn't override the parts of the contract that you need to get through to find if there was liability at all. It's a damages provision, it's not

a liability provision. Other than the words "good faith" being in there, I don't think it bears any relevance to this analysis.

With respect, your Honor, just kind of thinking of what is new and what you didn't have the chance to address, with respect to the agency argument, I don't think there is anything that's meaningfully pled that is new and that would give you reason, based on a new pleading, to revisit that analysis. I don't think there are any new pled facts, and I don't think there are, meaningfully, any new argued points.

With respect to the discretion point, the new material in the complaint, which I'm sure it appears some other places but largely in paragraphs 45-69, is a whole section on history and custom and practice, but first of all, none of it changes the clear words of the statute, the "may," all the arguments that you've already considered that I won't go through, but it really skips perhaps the most significant part of the legislative history, that when the Monetary Control Act was amended and the sections that we were discussing were touched, 342 was one of those, and at the same time the reference to nonmember institutions was added. Congress did not touch the word "may."

And then if you go forward, as your Honor has acknowledged to 2022, when, again, there are amendments, we have the provision that requires the tracking of what is done

with master accounts and whether they're approved, rejected, pending, or withdrawn. There really is no reading of the insertion of the word "rejected" that doesn't confirm the discretionary aspect of granting a master account.

Your Honor, I'm happy to go through any of the other arguments. I think I've tried to highlight——and again, you have ample briefing——what we saw was new, what was not able to be argued before, or wasn't argued before a year ago. We don't think any of that changes the prior analysis.

THE COURT: A couple of additional questions.

Accepting your position, which is largely the position that I took in denying the motion for a preliminary injunction, does that mean that there is no mechanism for a bank which has a master account closed to complain about the closing of that master account?

MR. YOUNGWOOD: Certainly not in this situation. Having to make it my easiest argument——I think the other arguments work, but my easiest argument, not when you've signed a contract that allows the party you're contracting with to have complete discretion. That was something they could have, I suppose, not agreed to do, but they did it, and they didn't do it once, they did it twice, and they did it after a history where——and I won't cite the history, but it's in the pleadings, it's before you, you know, a history of issues concerning risk being raised. They signed the supplemental agreement, which we

didn't need. We could have just had the first agreement. So here, your Honor, I think it's actually an easy no. I will tell you, the Ninth Circuit——

THE COURT: That, of course, assumes that there is no good-faith exception to the ability to allegedly breach the contract.

MR. YOUNGWOOD: Under this contract, we don't believe the motivation would be relevant. We also think, even if one were to think it was relevant, based on the pleadings, based on the facts, based on the documents incorporated in the record before this Court, which had the benefit of the prior preliminary injunction, that you really couldn't come to a conclusion that there was a lack of good faith. I understand your question is a larger one, like take a different set of facts, but I do want to focus on the ones we have.

Your Honor, the answer to your question is that would be for Congress, and there are plenty of things that happen in the world, in the country, where Congress has provided remedies, and there are plenty when they don't.

THE COURT: So you've moved to the statute over the contract. You've told me what you want to tell me about the contract.

MR. YOUNGWOOD: Your Honor, I don't think——I'll give you two answers. One, I can't come up with a situation where the discretion granted to this contract and the cases we've

cited to you, in New York and in this district——once you have unfettered discretion, the motivation doesn't matter, but I will add to it that under the facts of this case, you don't need to answer that question, in our view, because there is a huge record of what happened here and a huge basis for this decision that doesn't require a finding that I see bad faith but I'm not going to be able to do anything because there's actually a full record of good faith here, notwithstanding conclusory allegations in the complaint to the contrary.

THE COURT: Okay. So then the second issue is, putting the contract aside, no remedy for a bank, which claims that the master account was unfairly in bad faith closed by the local Federal Reserve Bank? And your answer is, that's right, no remedy; if you want a remedy, go to Congress.

MR. YOUNGWOOD: And I would——you asked about closed, your Honor. I'd answer the same about denial or rejection of opening. Effectively, yes, your Honor. And why do we in part know that, that Congress is an avenue? Well, I'd actually point back to the 2022 amendment that has Congress tracking and looking over and performing its own oversight role, and again, I don't have to give a litany of it, but there are——Congress gives rights to remedies through statutes. You need to have a statute that provides for liability, provides an avenue, and in this particular situation, for all the arguments we've discussed, certainly based on these facts but, yes, more

generally, Congress has not provided that. That doesn't mean it's not done anything. It has oversight. It's tracking. I am certain, if there was an issue, there are plenty of avenues to go to Congress to ask, and your Honor, what's remarkable is that you have to look at the database. There are very, very, very few rejections that have actually been tracked. So it is not some colossal issue of the banks rejecting all of these. Again, that's not on the record, it is in the database, if your chambers wishes to look, but Congress is watching.

THE COURT: All right. A more particular question. With respect to the count under the Due Process Clause, what's the basis, as far as you know, for a cause of action for a violation of the Due Process Clause?

MR. YOUNGWOOD: Well, I think there's a number, so I have trouble fully understanding what the basis would be here because——

THE COURT: No, no. But just assume that there is the deprivation of a privacy right in violation of the Fifth Amendment.

MR. YOUNGWOOD: Yes. And assume, your Honor, that my client is subject to the Fifth Amendment, right? I wouldn't be——well, I don't need to tell your Honor.

THE COURT: Right.

MR. YOUNGWOOD: But I wouldn't be, a private citizen wouldn't be, right, so not everyone is, and I don't think

they've established that my client is.

THE COURT: But what's the basis for a claim under the Due Process Clause of the Fifth Amendment? We have all this litigation, if you will, over whether there are enforceable private rights of action under individual constitutional provisions. So we have *Bivens*, for example. So here we have a claim that what both the bank and the board did was a violation of the Due Process Clause of the Fifth Amendment. And I see the parties argue that there was no violation of the Due Process Clause of the Fifth Amendment. But I don't think in the briefs there is any argument over whether there is a claim that a party can make for a violation of the Due Process Clause of the Fifth Amendment.

MR. YOUNGWOOD: I hear you, your Honor, and I can't think of what the basis would be against this defendant.

THE COURT: Okay. Thank you.

MR. YOUNGWOOD: Thank you, your Honor.

MR. CHADWICK: Good morning, your Honor. Joshua Chadwick from Federal Reserve Board. And I won't take the same amount of time because, from my perspective, it remains a mystery as to why the board continues to be a defendant in this case. There can be no doubt that the board has no ability to open, close, or maintain master accounts. This deposit-taking authority was granted by Congress directly in Reserve banks, not to the board, which is a government agency; it is not a

bank. As a result, this Court found, in your Honor's preliminary injunction decision, that BSJI lacks standing as to the board, which has not caused injury to BSJI and could not address the injury that it claims. Nothing in the amended complaint alters this conclusion. The central allegation in the complaint——

THE COURT: The response by the plaintiff is that the board effectively controlled the rejection of the master account and that the bank would not have gone forward if the board had simply said no. So the question is whether that's sufficient to give the plaintiff standing against the board.

MR. CHADWICK: Well, I would submit that it doesn't, your Honor, and I'm not quite sure that their complaint really goes quite that far. If you look at paragraph 179, they say the board "refused to intervene." But I would submit that the board had no duty to intervene in a Reserve bank decision vested by Congress in the Reserve bank. It is of course true that the board exercised its general supervisory authority as to Reserve banks, it has a lot of supervisory authority as to commercial banks, and it used that authority to issue its account access guidelines, but it doesn't make account decisions by Reserve banks a board decision, and there's no facts that suggest——no alleged facts——that the board made the decision here, and it didn't. The board's obligation under the statute was to issue a pricing schedule based on certain

pricing principles, including that pricing for member and nonmember banks would be the same. That's clear in the Monetary Control Act. But there's no question that the board has done just that, in full satisfaction of its statutory obligations under the act. So I would contend that BSJI cannot maintain a suit against the board in this situation and that the motion to dismiss should be granted as to the board for that reason alone, in addition to all the other reasons that Mr. Youngwood has put forth.

THE COURT: And that comes down to your argument of standing.

MR. CHADWICK: Yes, your Honor.

THE COURT: Okay.

MR. CHADWICK: And I'd be happy to answer any questions that you have, but otherwise——

THE COURT: No. Thank you.

Plaintiff?

MR. LOWELL: Good morning, your Honor.

THE COURT: Good morning.

MR. LOWELL: Given what you asked for, I'll respond. I have ten things I would like the Court to consider before it makes its rulings. I'll try to——

THE COURT: Sure. Could I ask you a couple of preliminary questions. Maybe they'll be covered by your points.

What's the current status of the bank?

MR. LOWELL: So if you remember, a year ago, we had gone from where we had stood when we were reinstated back in '20 to 13 or 14 accounts and whatever was under deposit then. We are down to 10 accounts and only $20,000 in those accounts because there's no ability to operate, and those are staying there with the chance and with the idea that we will reverse this, get our master account back, and that will be the starting point. So right now, in terms of where the bank stands, that's where the bank stands.

THE COURT: Okay. The representation last time was that the bank couldn't operate, that it would close.

MR. LOWELL: Well, it's not operating. It has people that are willing to keep a total of 20,000 there with the chance that this will be reversed and we'll go forward. It is, for all intents and purposes, closed.

THE COURT: Okay. If I were to agree with the motion to dismiss, are you looking for the opportunity to file an amended complaint, or is it time, like the other cases, to go to another court?

MR. LOWELL: It is interesting that we have parallel tracks in various ways that are finding their way up, and maybe all the way up to the Supreme Court, which I'll come back to as one of the things that's changed in the last year, in terms of deference to agencies, in a second, or in half a minute. But I

think the answer is, it's sort of a circular, because I believe what I want to make sure the Court considers today, as it was asking questions of the defendants, is that the record is not quite ready for a final determination as to whether there should be an amendment to the complaint because I think, for example, in the *Custodia* case, which the defendants have put forward and argued is great precedent, I hope it's great precedent for the Court to remember that in that case, the Court denied a motion to dismiss so that it could develop a record on those things that were fact driven. One of the things that are fact driven would be whether or not the Reserve bank itself is an agency. That was preserved in the motion to dismiss denial so that discovery could take place, and then thereafter, the rest of the case went forward on that regard. So as to another difference that makes a difference is that we do have those contract claims; we have those contract claims which by definition are fact driven. Consequently, in those facts, including the existence of a lack of good faith, or, to put it another way, bad faith or lack of fair dealing, that could very well lead to another amendment or a request to amend the complaint.

THE COURT: But haven't you alleged everything that you really wanted to allege in terms of breach of contract, breach of the covenant of good faith and fair dealing in the current complaint?

MR. LOWELL: Yes, in a way, but one of the differences between a year ago and today is the standard of review that you're under. So when learned counsel at the table to my left says that we have pled conclusorily, well, that's what pleadings are, but those conclusions have to be accepted as true, in a motion to dismiss, and here are the things that the Court needs to accept as true.

THE COURT: Well, no. Conclusory statements——

MR. LOWELL: Well, I don't mean conclusions, Judge. These are the facts that have been pled, and that the Court, in a motion to dismiss, ought to accept as true, and those facts include the following things.

Sorry?

THE COURT: Oh, okay. We can come back to that. I've interrupted you on the ten things that you wanted to tell me, which will probably cover the issue of amendment.

MR. LOWELL: It would cover——

THE COURT: Go ahead.

MR. LOWELL: It would cover the facts for which, in a motion to dismiss, the Court must take as true, which would not be "conclusory," and to use counsel's phrase, "huge record," which was articulated some minutes ago, is right. There's a huge record that you need to accept as true. I'll come back to what those six or seven things in the record are that are not conclusions.

So you and I have already done a little about what's changed in a year. Let me tell you a few other things that have changed. The standard I've already talked to you about. You asked counsel about the pendency of cases that are dealing with some of the same issues. They're not all the same issues. For example, in neither of the cases is there a contract claim. In *Custodia*, there is not the issue of agency, as counsel corrected himself. Remember, as you asked me a year ago, that we are dealing with a termination of an account——

THE COURT: That cuts both ways, though.

MR. LOWELL: It cuts both ways.

THE COURT: The existence of the contract would appear to give the right to the bank to close the account at any time. It takes it away from some of the cases where, for example, the account was denied at the outset.

MR. LOWELL: It does, if we were arguing from a position where the contractual right to terminate was the end of the sentence and there was nothing else that came about with that. But that's not the way it is. That contractual right to terminate comes with (a) proper notice, which we know is a matter of days, but it also comes with the contractual and implied covenants of good faith, fair dealing, and a duty of care. So if it was a bare termination right, then it would make a difference or no difference between the statutory interpretation and the contract. But if it comes with those——

and I don't think the Court could find that those terms don't exist——then it becomes an issue of fact as to whether or not, in exercising that contractual theoretical right of termination, it did in fact come as a result of a good-faith consideration or a duty of care or fair dealing, and we have alleged not.

THE COURT: So your argument is that the existence of the contracts, which appear to reinforce the ability of the bank to reject, close the master account, with a few days' notice, that contractually imposed more restrictions on the bank than would have existed without that contract. That seems to be counterintuitive. It seems as though the contract is there to certainly solidify the ability of the bank to close the account because there had been problems or perceived problems by the bank with the account. You say, well, this case differs from some of the other cases because we have a contract that actually limited the ability of the bank to close the account.

MR. LOWELL: Well, to respond, it's not quite the way you said. There are parallel lines of rights in the world, right? Some are statutory, some are constitutional, and some are contractual. It may turn out that in applying the third, which I didn't say it in the right order, but the contractual part, that has obligations on both sides of the equation, which we have agreed to do. And then the regulator——not the

regulator, I'm sorry, in this case——the New York bank and then the Fed, in this case New York, has said, this is the way we'll operate. But your question starts with a premise that you know we don't agree with, which was that they had the right to reject or, in our case, terminate the master account under the statute, which we don't believe is the case.

THE COURT: No, I know that. I was just following up on the argument you had made a moment ago that this case differs from other cases because there is this contract, which I took your argument to mean, unlike the other cases, in this case, the bank is further restricted because of the existence of the contract. From whatever rights it had under the statute in this case, the bank is further restricted because there is a contract.

MR. LOWELL: Bank meaning the defendants.

THE COURT: Meaning the Federal Reserve Bank of New York.

MR. LOWELL: Well, the way you phrased the question is not something I can agree with, because it's not that they're further restricted. We have a right, and that right is not——is to have a master account conferred to us by 248(a). Fine. That's what we believe to be the case. Then there became a contract. And the contract was between the Fed and us, and then it says, okay, we have this right. But you, in the contract, said we can terminate that right that you have based

on A, B, and C. And we're suggesting that A, B, and C doesn't exist in this case, and in a motion to dismiss, we have alleged facts that would indicate, if you took it as true, it has not been done with good faith, fair dealing, and duty of care. Just one example, Judge. They applied, in their regulatory scheme, this idea that they didn't have to but they did say, okay, and by the way, the reason we're doing what we did is we come to the conclusion that BSJI is an under-risk to the overall economy. That was a regulation, by the way, Judge, that came into effect after they started going after BSJI. One of the things that would be interesting in discovery is to see cause and effect of that.

But putting that moment aside for a second, what they said is that——and if we're alleging good/bad faith and a duty of care, then how do they, the defendants, justify that this bank, which, when we came to you the first time had 14 customers, 12 accounts, 13——it's gotten its master account taken away, and since the year has gone by, we had already told you a year ago about Deutsche Bank, which has bazillions of dollars and lots of accounts, and was found wrongdoing that really does affect the overall economy, and never, ever got its master account taken away. And in the recent past, the historic result of the TD Bank plea of guilty, with gazillions of accounts and amounts of money that really does affect the overall economy. And they pled guilty. And they didn't have

their master account. And what we now know from what we're looking at and what we'll explore in discovery, there is not a coincidence going on with these IBEs and various regional banks, because there are a number of them, based on where they exist in the world, are being closed or rejected, and there is an element of that being explored as to whether or not these defendants are operating in good faith. So you're asking me, is it possible that this right——that the defendants imposed on themselves a higher restriction by entertaining a contract? My response is, both sides gave themselves rights and obligations, but their right to terminate didn't come without any conditions. And those conditions are pled in a way that would survive a motion to dismiss.

THE COURT: Okay. Go ahead.

MR. LOWELL: Thank you.

As we're answering questions, I have fewer than ten, but that's what you envisioned would happen.

So let me tell you two more things that happened.

THE COURT: Well, as long as——

MR. LOWELL: I'm glad they are——

THE COURT: Oh. Do you allege that there is any private right of action under the Federal Reserve Act?

MR. LOWELL: There is——well, private right of action. A party can sue under the Administrative Procedure Act as against a claim of arbitrary and capricious conduct. It is a

private cause of action.

THE COURT: By an agency, right?

MR. LOWELL: By an agency.

THE COURT: Right.

MR. LOWELL: And if an entity is not a government entity and they have violated our rights, then that's your first question to me, or one of your first questions to me, whether there might be a further amendment, because if we are now getting to the point of knowing that they're discriminating against our bank for reasons that we believe would not be condoned either by the contract or by things like, as you say, the various aspects of the Constitution, then yes, then there would be 42 U.S.C. 1983 or a *Bivens*-type action. We're not there yet, but we certainly have provided the foundation for that by our allegations that there is some discrimination going on and bad faith.

THE COURT: No, but I have several conceptual questions, just with the way in which the complaint is drafted and the papers. There is the Declaratory Judgment Act claim, and then there is a due process claim. With respect to the Declaratory Judgment Act claim, the Declaratory Judgment Act is not a basis for jurisdiction itself. So the papers indicate that you find the basis for jurisdiction under the Declaratory Judgment Act in either the APA or the mandamus statute. And my question is, I just want to make sure that you're not alleging

somewhere that there is a private right of action under the Federal Reserve Act, which gives you a basis for federal jurisdiction. That's the——

MR. LOWELL: I understand your question, and until you asked that question, I'm not sure that in any of the cases that are existing——*Custodia*, *Payservices*, ours, or any——that anybody contemplated it in the way you said. But when we tried to fold into the mandamus act and the APA, we believed it was broad enough to sustain the elements of what we are alleging they did wrong. I don't have a better answer than that for now. I will try to figure out before you rule if there is something else I can add to the record.

THE COURT: Okay.

MR. LOWELL: Because it is asking me to look at analogous areas, and I didn't do that before standing at this podium.

THE COURT: Okay. My related question, which you were getting to, which I asked your colleague on the other side, is, I read the due process claim, and the parties don't argue anywhere whether there is in fact a cause of action for the violation of the Due Process Clause of the Fifth Amendment. The parties argue either there was or there was no violation of the Due Process Clause. And it's stark because, you know, there's all this litigation out there whether there is a cause of action under individual constitutional rights. And there

surely has never been one for a violation of the Due Process Clause of the Fifth Amendment.

MR. LOWELL: There is a private right——again, we're in sort of theoretical land, and I appreciate it. As you're making my brain spin to come up with the analogy, it feels to me there is a private right of action for a violation of the Due Process Clause in another context. Wouldn't that be the equivalent if you were suing a federal entity or the officials of the agency, a *Bivens* action, and wouldn't it be a 1983?

THE COURT: But 1983 is for state officials.

MR. LOWELL: Right. But if the Federal Reserve of New York says, we're not a government agency, we're some private entity, that's kind of where they would hang.

THE COURT: There's no claim here for a violation of Section 1983.

MR. LOWELL: Right.

THE COURT: And the Supreme Court has made it clear that *Bivens* actions are carefully limited to the specific areas that the Court has said satisfied *Bivens*, and it's only recognized in very few cases. So——

MR. LOWELL: I will try to come up with something momentarily. I don't mean momentarily here——

THE COURT: That's okay. I wanted to make sure that I wasn't missing something in the briefs on either side, as I tried to work through this.

MR. LOWELL: I think you have not.

THE COURT: Your colleagues on the other side didn't come up with anything either, so——

MR. LOWELL: So it's worthy of consideration, but luckily for my point of view today, the causes that are alleged provide us the basis to go forward, in our view.

A couple other quick points on what's changed, and I'll move to a few others and pleas. Your questions, other than the one you just asked, is something that would have been part of my ten, but——remember that other things that have changed besides what I said about contracts and besides the rejection versus termination. There's a few things.

First, there are things that the Court needs to decide, at least in retrospect, before you make your final conclusion on things like whether the right exists that counsel for the defendants say doesn't. The Supreme Court did decide *Loper Bright*. The Supreme Court did say, by the way, this idea that we don't have as much discretion and deference, I should say, is something that will come about in a couple of the places I want to address to the Court.

THE COURT: Okay. Could I just stop you. I'm sorry.

MR. LOWELL: No, please. If I've said something——

THE COURT: At the outset, as to *Loper Bright*, this is not a case, so far as I can see, where I'm being asked to defer to an agency interpretation, so a case where I'm being told

that the statute is ambiguous and I should defer to an agency interpretation. I and the other courts that have interpreted the statutes have all gone to the statutes and interpreted them *de novo*, without considering what the agency has done or said, and so why is the elimination of *Chevron* relevant here?

MR. LOWELL: It seems to me that if the Court is saying, as counsel briefed and came and argued to you, that 248(a) says this and 342 says this, and that had no influence whatsoever on the Court's decisions in this motion to dismiss and you've come upon this based on yourself, then you're right, the limitation of *Loper* would have less, if not no, applicability. But I didn't read it that way, Judge, and I still don't, because what I'm asking the Court to do is to understand that the government's argument, the New York and the Fed's argument about how they get to the point of saying they have no discretion, is an example. Last week, Mr. Youngwood was the person who argued in front of the Ninth Circuit in the *Payservices* case. And the three-judge panel, among other things, asked him: Are you saying that the discretion that you have is complete and therefore if you had a case in which a bank was deprived on the allegation of some, for example, racial or other discrimination, that bank would have no ability to have rejects? Or another judge asked: If there was a case that you will not give a master account to everybody in Idaho, would that be something? And counsel for the defendants here

said, No, no, we don't have that much discretion. There would be redress. And what the redress was, we'll find it in another way, we'll find it in Title VII, although that wouldn't work for the Idaho bank, and we'll find it in some way. So then the defendants say: Here is our discretion, and this is how we found it. We can do what we just said we can do without any——and if they're saying that and the court is accepting it, then I think you have to look at it through now the lens of *Loper Bright*. That's all I'm saying.

THE COURT: Okay.

MR. LOWELL: Or, to put it another way——and this was something raised a year ago and they raised it again this morning. The defendants ask the Court to accept the notion that——

THE COURT: Could I just——

MR. LOWELL: Please.

THE COURT: It's plain that the defendants are subject to various statutes, including Title VII, or you'd have to get over sovereign immunity and all, but the examples raised by the circuit court judges in the other case are examples of whether the bank or the board is subject to other statutes, regulations. The question in this case is whether, under the provisions of the Federal Reserve Act, that in some way prevents the bank, under the supervision of the board, from rejecting or closing a master account. That's wholly

different. But the *Chevron* issue would be, is the court deferring to some agency interpretation as opposed to, in good faith, reading the statutes and making the determination under the statutes.

MR. LOWELL: I don't have any disagreement with that. So as I said, put aside the issue of whether or not this Court and the other courts came to an independent *de novo* consideration without regard to any argument made by the agency or the board.

THE COURT: By the way, I don't think, in my preliminary injunction decision, I cited agency interpretations of the statutes.

MR. LOWELL: Well, when you say——this is a little fuzzy for me, Judge, to be honest. When you say agency interpretation, as they argue agency interpretation, are they saying, for example, what we're putting in our briefs and telling you that this is the reason 248(a) doesn't work the way it does, it's not a formal rulemaking event, but it's a position of the agency which it's putting forward and saying, Dear, Judge, please accept this? But I don't want to get hung up as to whether or not what I'm about to say as to your final conclusion for your *de novo* review is governed by *Chevron* or *Loper*. What I would like the Court to consider before you pen your ultimate decision in this case are a few subpoints to my No. 2, which is, you know, even today——I checked this morning——

in terms of what the government says is the way the statute works, on their website today, the question is, will the new account structure——the master accounts, from the time that it was first put into effect, when master accounts came into effect, however many years ago, they put on their site a set of questions and answers:

Will the new account structure be available to all depository institutions?

A. They will be applicable to all depository institutions.

Footnote. What does the footnote say? It says, The Monetary Control Act is the principal statute governing access. That is 248(a). It doesn't even mention 342, which is what they keep saying gives them the "may" that overcomes the "shall." And I think that's something to consider.

The next thing they ask is for you to adopt the position——again, I don't know if it's deference, but it's asking you to again rule that 248(a) isn't applicable, and one of the reasons they ask that is they point to the 2020 amendment to the FRA and they say Congress is watching, Congress is monitoring. And, you know, you live by statutory language, then you should also perish by statutory language. Notice that the statute amendment——which Senator Toomey, who was the author, has explained its purpose, which was because one bank that was in the system was agreed to, rejected, agreed

to again, and they wanted to know why——mentions the word "application," "rejection," and has no reporting requirement for termination. The word "termination" doesn't exist anywhere in the amendment. And we are in the category of termination, not rejection. And there is a purpose for that, given the purpose of what the amendment was for.

And so, again, if you want to be textual, we all, from first year of law school, remember the *expressio unius*. I'm saying that if their argument is, *oh, Congress has endorsed the fact that we have this unbridled discretion and look why, because we're reporting on rejections,* they fail, because there's nothing in that that reports on terminations.

Similarly, last year——I went back to the transcript. And you asked the defendants the impact of the case here in the circuit of *Greater Buffalo*, and at the time they said they didn't answer it. And then in your opinion you have a footnote, and your opinion's footnote properly sets out that what's happening here is we're addressing the issue of whether we have an absolute, nondiscretionary right to a master account, and *Greater Buffalo* was talking about a service of check clearing, but I don't think the defendants appreciated what underlies that. And I'm asking the Court to consider that as well. What underlies that is this: The services that the act provides, which includes check clearing, wire transfers, ACH, are services that don't exist without the ability to have

a master account. You can't check clear, you can't wire, you can't do ACH without having a connection to the system, and that connection to the system is a master account. So to give the full flavor to what the Second Circuit said, as there being a, if you will, all-banks ability to have these services, which they never contested, then it doesn't understand or appreciate that that is saying something without the basis for doing it.

Also, I'm asking the Court to consider, before you finally rule that on 248(a) itself, which the government put forward——I'm sorry——Fed and New York put forward as saying this is a pricing structure which the Court also adopted, I went back to look at that, Judge, and I don't understand that application or that argument. Because 248(a) speaks as follows: All Federal Reserve Bank services covered by the fee schedule shall——that's where we get the "shall"——be available to nonmember institutions. It could have been a period, but they had a conjunctive. And such services will be priced in the same fee. And was taken out. It's as if that was the only thing that clause says. The first part of it says you get the services, stop, full stop. It's the second clause that says, and it should be at the same price. To call that sentence simply a pricing basically reads the word "add" out of it and ignores the first part of that. I want the Court to consider that as well.

THE COURT: Okay. But all of that comes under the

statute which is entitled Pricing of Services, and the specific provision that you rely on comes under the heading of the Schedule of Fees Prescribed Pursuant to this Section Shall Be Based on the Following Principles. It's hard to read that section directed to the board as a direction which overcomes what 342 says. I mean, you take issue with my description of that section as a pricing schedule, but that's what it says.

MR. LOWELL: That's what the title says. The language of the actual admonition and statute still has two parts to it. Look, I do understand, and again, going back to the fact that I'm the person who said what did we learn in the first year of law school, I do understand that in the first year of law school, you also learn that you don't look particularly to the title of something, you look at its merits and its substance and its words. I get it. I understand that you can find that the title of that statute and in the section means it's only, if you will, a pricing. I read it as to what it says. And then more importantly, when you just raised 342 again, if you want to use the same statutory construction, mechanism, 342's words, yes, it says "may." Of course it says "may." But what's the "may" about? It's a particular transaction type. You may accept deposits. Now it's kind of like——I was trying to figure out what would be similar, and I haven't come up with a great analysis, but this whole structure seems to me that what you get is a bank that meets the minimum structural

requirements to be in the master account system. You have to have minimum deposits, and you do. And then you get in the door. And then they're saying you don't have to take every transaction, New York, you don't have to accept every transaction, which answers your question of a year ago, which is, if they see that there's a bad transaction, are they silent? Do they have to shut the bank down in order to stop it? No, they don't. They have the power to look at and do that. Having said that, the "may" applies to only part of the function. But how do you take this "may" and say that it also applies to the services; for example, *Greater Buffalo* says "comes along for the ride." We all look at "shall" and "may" as if "may" applies to the same set of services than "shall." And "shall" is a broader set of services than "may." And before the Court rules, I hope that you would look at that, especially because the counsel for the defendants came just moments ago and said, look, this monitoring function shows so few rejections that it shows that the system is not as vast or as problematic as the plaintiff here and in *Custodia* and in *Payservices* say. I will point out that what's happening and also is out there for you to see in the way it's being reported besides the lack of termination, is that sometimes they're just not ruling on these applications. People withdraw them because the wait is so long. I don't think you can look at the fact that that statute has required reporting as an endorsement of

what happened. I told you, on the statutory part——I want to get to the contract part in a second, the new cause of action, but I do want to point out that before that, if they conceded in their argument last week that their discretion under 248(a) or 342 or any other number you can come up with is not unbridled because they can't discriminate by race and they can't discriminate by geography, then what we've established is that they have in fact limited their unbridled discretion, and then the question is, where do you draw the line.

THE COURT: Hold on. You can explain it to me in greater detail, but I don't see anything inconsistent with that. Neither defendant says that it's above the law. Neither defendant says that there cannot be statutes out there that apply to them, and that prevent them from violating various laws, including laws against discrimination. That's a wholly separate argument from whether any of the provisions of the Federal Reserve Act or a contract prevent them from doing what they did in this case. In order to make that argument, you have to find something in the statute or in the contract that prevents them from doing what they did in this case. That doesn't mean that they're not subject to other statutes or other laws, or other——

MR. LOWELL: The violation of those other statutes and those other laws. So just to put it in three levels, and one is they think we don't have discretion at all, and something

else comes into the system to regulate. The second is, if they have discretion, then you're right, other things come into bear. One of the things that comes into play is the Administrative Procedure Act to take that power and not to act arbitrarily and capriciously, and in that second tier of attack, in our complaint and in our argument, we have alleged facts. The Court needs to accept them as true, that they have acted arbitrarily and capriciously, no differently than if our allegation had been that they denied us our master account, if we were a *Custodia* or terminated our account, as BSJI, for racial discrimination or geographic reasons. We have alleged arbitrary and capricious conduct. And the specifics to that, which also carry over onto the contract claim, of good faith, fair dealing, are the things that are in the record—among others, the pretext of the reporting system, then changing to the fact that our consultant said that we had enhancements which they turned into deficiencies. Then getting a new regulation where they imposed the undue risk of the overall economy, where they have not engaged with the consultants—by the way, the consultants which they hired themselves to review their own transactions. We have set those out. We have set out all the facts of what you have now seen both in the injunction and here, as the things they have done that is not conclusory. It is an allegation that they have done A, B, C, and D. Pretext. Looking to not taking an undue risk and not

apply it properly. Saying as to BSJI, you know, if Deutsche Bank and TD Bank are too big to fail, then banks like BSJI and the other IBs are too small to have any rights to not be treated arbitrarily and capriciously. We have set those out. And so that's the tier of arbitrary and capricious.

And then the third tier is our contract claim, which says that we entered a contract with you, yes, you have the right to terminate us, which is what you did, but you didn't do it the way the law requires you to do it, for some of the same reasons that in fact would factor into arbitrary and capricious. And as to those two, as to the APA, by the way, as to whether New York is an agency or not, is a question of fact. It's not a question of law. I mean, even in the *Custodia* case that they told you about, that was the case.

THE COURT: Is there any case in the last 25 years which has ever found a Reserve bank to be an agency of the government?

MR. LOWELL: I think we did point to the——

THE COURT: I think——

MR. LOWELL: *Flight International* and the *Lee* cases which talked about the Reserve banks being agency.

THE COURT: Those I think are district court cases which are pretty old.

MR. LOWELL: They are district court cases that——okay, they are pretty old. But that's what they say. I mean, and we

had this conversation a year ago too. I don't have a Court of Appeals——we may have one Court of Appeals in the next few months that may opine on that. One of those cases does address that, one doesn't. But some of the law that we look to today comes from case decisions that are 100 years old. It doesn't mean that they're wrong, but I can tell you the factors, though, haven't changed. You have to have an agency that controls access to government system, that performs important government functions, that it exercised power of the government. Nobody is denying that the New York Fed here has the ability to regulate whether somebody gets into the system or not and they do so by delegated authority that they've gotten from their supervisor, the overall Federal Reserve Board. So if you apply the logic or at least the criteria of those district court cases, they still are good law to apply here that this is an agency.

And as to the Fed standing argument, I guess it would be the natural place to address it. I mean, as you addressed it in your question, not that that's your conclusion, but your question does indicate that the Fed basically gives the authority to and says carry it out in this fashion, and what did New York do? When they weren't able to keep the bank's master account suspended for a late report, they then pivoted to say, the reason is you now are a bank that creates an undue risk to the overall economy, which was adopting the Fed's

regulation that was promulgated during the BSJI dispute, to give them the bullet. It's as if somebody sold the gun, the Fed, to the Federal Reserve Board of New York, who shot it, and the Federal Reserve Board says, don't blame us, we just gave you the gun. So it seems to me that as to both, the standing issue to the board and as to whether the New York agency is an agency, you look at the criteria, and they both satisfy where their arbitrary and capricious conduct would come into play. And again, I realize we have a year's worth of briefs, but in a motion to dismiss, we have alleged the facts that put that there, and *Custodia* said, as your footnote No. 9, I think it was, said, in a preliminary injunction, we don't need to delve the record, but in a motion to dismiss, we must.

The thing I want to say in sort of towards the conclusion, if you have any other questions——I was up to No. 9 in my list of 10——is that the contract claim——you asked me a year ago whether I was alleging bad faith, and it was a little bit of a tautology for me because a lack of good faith that the standard is almost says that it has to be bad faith. But right now I believe that the things that we've pointed out, including the disparate treatment between those banks that they regulate or that they give rights to, gets to the issue of deciding whether there are facts over the contractual rights of duty of care, good faith, and fair dealing. And those, as I pointed out, your Honor, are not conclusory, to use that word when I

adopted it. But if you look carefully at what we have alleged, it is the individual facts that I have just indicated. And if you needed them again, they are there, but they have everything to do with applying the 2677-S letter in a way that creates a tier 3 scrutiny that the other banks do, which, contrary to the flavor of 248(a), is not putting these banks on a level playing field, it's not treating them equally. If the inconsistency in how they first said what we were doing was a risk to the New York and then came up with, it's the overall economy, it's the way they've changed their grounds.

And on that, the last piece that you were addressing that I would like to ask you to consider, I don't quite get the argument that if the operating circular, which is included in the contract, does have a provision that says limits of liability, then it is kind of almost obvious to have a limit of liability, then there's the possibility of having liability. And if the stack of their Code of Federal Regulations, which we point out, has a provision which calls for a two-year statute of limitations on any assertion of good faith and ordinary care, isn't that a concession that there is a cause of action for good faith and ordinary care which we have addressed?

So lastly, No. 10 on my list was, given the structure of the *Custodia* motion to dismiss, what would be gained by this case going forward to complete the record? Among other things, what we would do is we would find out the involvement of the

Fed in the decision-making, because we saw in the limited discovery that there was such a thing as a pre-decisional memorandum that came into play. We would find out how it's possible that it turns out that only these IBEs are either being rejected from this part of the country, of our country, or how it's possible that these banks are getting rejected or terminated and banks that really do have an undue influence on the overall economy are allowed to survive and continue notwithstanding pleading guilty to criminal offenses. You would be able to point——

THE COURT: I actually gave you limited discovery. I required the board to produce the communications, right?

MR. LOWELL: Yes, we got some, but, yeah, we didn't get the administrative record, per se, because we got limited amounts. We got one memorandum that we are looking to find out more about. You did. You did. And I don't know the answer to this, so when I come up with the answer to the question that I didn't have for you in the next hours, I will also go back and see what was the limited discovery that existed in discovery for the Court to then deny the motion to dismiss so that a fuller record could be made, and that may be instructive to your Honor as well.

So I guess to conclude——and of course if you have questions, fine——I think that there are those three levels that we are addressing. As to whether we have an absolute right, to

which you've addressed it *de novo* before, I think there are some things that have happened afterwards, including how they buttress their argument by what happened in the NDAA amendment to the FRA. We have them both in the category, at least at a motion to dismiss, of being agencies for which arbitrary and capricious conduct is disapproved. And we have the specifics of a bank that is in business that had its master account terminated by way of a contract issue, which we have given facts of, that should be explored to determine whether the both contractual and applied covenants of good faith, fair dealing, and duty of care, have been violated. And at this juncture, that should be enough for this case to go forward.

THE COURT: All right. Thank you.

Mr. Youngwood?

MR. LOWELL: Your Honor, let me just confer with my colleagues.

Thank you, your Honor.

MR. YOUNGWOOD: Your Honor, I'll just skip around, make a few very brief points.

You had asked me and Mr. Lowell about a basis for a due process claim. We obviously submit it would be their burden to find a basis. Although you are correct, your Honor, not briefed in this case, there is a discussion of this issue, if it's useful to you, in the *Payservices* district court decision, a case which is 2024 WL 137094, Judge Patricco, on

page——it's a Westlaw version, as I said——*11, there's a discussion where he loops together the mandamus act, the due process, and goes through relatively briefly concluding that, since he doesn't think it's pled, that the bank is either an agency or the federal government, that there can't be a due process claim. I'm abbreviating what he found, but if it's helpful, your Honor——

THE COURT: I'm not getting it. Does that judge say that there is a claim?

MR. YOUNGWOOD: No. He says there's not a claim.

THE COURT: But for reasons other than the fact that it fails to state a claim, rather than the fact that there is no cause of action for a violation of the Due Process Clause.

MR. YOUNGWOOD: He cites one case, your Honor. It's *Bingue*——or I'm sure I'm garbling the name, but *Bingue v. Pruchak*, 512 F.3d 169. It's a Ninth Circuit case. And the quote he gives as the Fifth Amendment's Due Process Clause only applies to the federal government. That is in part——he also doesn't find there to be a due process violation. But your Honor, I just wanted to——since we've been discussing *Payservices*, I wanted to share that that court has a brief analysis that touches on the issue. I didn't say it was directly. Your Honor, I think I've made this point. We make it in the brief. There's a lot of words of lack of good faith or bad faith, and a lot of speculation as to the Federal

Reserve Bank of New York's attitude towards IBEs. The pleadings, however, are scant to nothing. There's——sorry, paragraph 11 of the complaint, which cites to a Reuters article from 2019. That's really it. It doesn't outline all the——I'm sorry, I will use the word again——conclusory, conclusory discrimination that's been argued to you. There's just no basis, if it mattered, even, if there was good faith or bad faith here, and you have our positions on why, given these facts, it doesn't. It's just not pled in a way that we should have a fishing expedition for two years of discovery to see what there is. There's just no basis for it. Your Honor, I won't comment on my Ninth Circuit argument of last week on the different case. It's on the Ninth Circuit website if anyone wants it. I don't think that counsel accurately characterized much of the colloquy with the panel. But it is what it is. The record is what it is.

There was discussion of *Greater Buffalo*, which your Honor has already addressed in your prior decision. What I will note is, you don't have to have a master account to have the check services that are referenced in that case. We discussed this quite a bit a year ago. We haven't mentioned it at all today. But you can have a corresponding bank relationship. And many, many banks do. In fact, your Honor, if everyone could just have a master account because they wanted one, I don't think there would be a need for

corresponding bank relationships, so this picture of how the whole banking system works really is skipping the availability of the option of the corresponding bank relationship.

And your Honor, I think the final point——and I'll be really quite brief because I think your Honor is correct that you didn't base your prior decision on *Chevron* deference. But to the extent that that matters and it was never the basis of our argument and is not the basis of our argument, you know, *Loper Bright* didn't completely say what agencies do and think. And again, we're not positing that our client is an agency. Doesn't matter. They said it was less controlling or noncontrolling than it was. It is still possible——and the *Loper* case at page 2249 acknowledges this and actually this circuit, on November 13, in the *Art and Antique Dealers League of America v. SEGGOS*, 2024 U.S. App LEXIS 28736, at *27, also noted that effectively what an agency does may not be something you defer to, but if you're persuaded by it, you're persuaded by it, and agencies do have some familiarity. But again, I don't think that's the argument here. I don't think there's a need to get there, because we think the statutes are quite clear. And my true final point, your Honor——back to the contracts and the limitation of liability. We haven't taken the position that there's nothing that could happen under those contracts that could lead to liability. Take the check clearing. If the bank messed up check clearing for somebody

who had a master account and the check was delayed, maybe that's a claim? And that's why you have limitation of liability clause. But you have to find, somewhere else in the contract, the basis for the liability, and the claim here is you didn't have a right to take away your master account. The contract says the contrary, directly and consistently, in more than one place. And in reference to the original operating circular, it says, with notice——I don't think that's very practical, but I don't think that's the issue here. Couple days' notice, we have the discretion to take it away.

Thank you, your Honor.

THE COURT: All right.

MR. CHADWICK: Just three quick points, your Honor, because I think these are issues that you already understand. But in their briefs and again today, Mr. Lowell used the term "delegation of fair bid." But I just want to be clear, the Federal Reserve Act lays out authorities of the board and the authorities of the Reserve bank, and it's separate sections of the act. It also allows the board to delegate certain functions to Reserve banks. Many of those are laid out in the board's regulations. That's 12 C.F.R. 265.20. But just to circle back's to the master accounts are deposit accounts, the deposit-taking function is a Reserve bank function. There's no credible argument that it's been delegated by the board. That's just plainly incorrect.

Quickly, on *the Custodia* issue of discovery, I think if you look at the judge's decision at pages 14 and 15, he's pretty upfront about the fact that discovery was unnecessary and it was a question of statutory interpretation, in the end, that controlled his decision.

And then finally, Mr. Lowell I think referred to the Monetary Control Act and 248(a) as synonymous, but 342 is central to that act. The Monetary Control Act had the ability to charge fees, but needed the authorization to accept deposits in 342. That's a core aspect of the Monetary Control Act, and that's why we feel it's central here.

MR. LOWELL: Judge, only to address a point that they just brought up that I didn't have a chance to, may I address that?

THE COURT: All right. Briefly.

MR. LOWELL: It will be very brief.

I wanted to address the issue of this corresponding bank issue, which they brought up, because in *Greater Buffalo* and others, first of all, provision in *Greater Buffalo* that's cited for the services. Doesn't have directly or indirectly. They're inserting the concept that you can have this service through some other means. And what makes no sense about that point is simply that they have the right to agree or disagree as to whether or not we have the right to get to approve that corresponding bank process. So they say that our bank creates

on undue risk to the overall economy and says so because it talks about the possibility of lack of compliance, red flags of money laundering, whatever. That's great as a calling card to get a corresponding bank to agree. We have tried, and there's no corresponding bank that wants to partner with us. But secondly, they have the right to approve, even that discretion unbridled. So if they said this about our bank, which they did, I guess I'd like them to go on the record to say they will not disapprove of any corresponding bank that we could possibly find that such a bank would be doing with us. So the corresponding bank aspect is a bit of a lark.

And the second thing they said that I want to come back to is the last piece, which is that after they got discovery and there was a motion for summary judgment, a district court may have very well said discovery had not been necessary, but they only came to that decision after the discovery occurred, not before, or else why would they have ordered discovery on those things that are left.

And those are the two points they made that I wanted to respond to.

THE COURT: Okay. Thank you, all. I appreciated the briefs. I appreciated the arguments. There was a reference to perhaps submitting something else, and I'm not preventing you from doing that, if my questions raised something that has to be responded to. But if there's going to be any subsequent

submission, no more than two pages from any party. And it's due on Monday. I'm not suggesting that you have to do this, but there was a suggestion that on a couple of points you wanted to think further. So——

MR. LOWELL: Certainly one, and I appreciate the opportunity, and I'm not sure we'll have anything, but we can comply with both of those, two pages by Monday.

THE COURT: And the parties should consult. I mean, I don't want to encourage briefs and reply briefs, surreply briefs, etc.

MR. YOUNGWOOD: Your Honor, I don't think——if you would have said no further submissions, we would not have objected, so I don't know what we'd be responding to. Could it be that plaintiff writes a brief and you give us two days to respond to it? Because right now we don't have plans to say anything and I don't know what he's going to write about.

THE COURT: Okay. The plaintiff can submit no more than a two-page letter by Monday because there were a couple of issues, including what's the statutory basis or other basis for a due process claim, and less so is the plaintiff arguing that there is any private right of action under the Federal Reserve Act. So no more than two pages, by Monday, and the defendants can submit a response, no more than one page, by Tuesday.

MR. YOUNGWOOD: That's fine, your Honor.

MR. LOWELL: Thank you.

THE COURT: Okay. Thank you, all.

MR. LOWELL: Thanks for your time.

MR. YOUNGWOOD: Thank you, your Honor.

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